

FCC MAIL SECTION

Before the  
**FEDERAL COMMUNICATIONS COMMISSIONS** FCC 99I-11  
 Washington D.C. 20554

DISPATCHED BY

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In re Applications of	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS,	)	File No. BPH-870831MI
A LIMITED PARTNERSHIP	)	
	)	
WILLSYR COMMUNICATIONS	)	File No. BPH-870831MJ
LIMITED PARTNERSHIP	)	
	)	
BILTMORE FOREST	)	File No. BPH-870831MK
BROADCASTING FM, INC.	)	
	)	
SKYLAND BROADCASTING	)	File No. BPH-870831ML
COMPANY	)	
	)	
ORION COMMUNICATIONS	)	File No. BPH-870901ME
LIMITED	)	
	)	
For a Construction Permit for a New	)	
FM Broadcast Station on Channel 243A	)	
at Biltmore Forest, North Carolina	)	

**ORDER**

Adopted: May 10, 1999

; Released: May 12, 1999

By the Assistant General Counsel, Administrative Law Division:

1. This order identifies the above-captioned applicants as the only qualified bidders eligible to participate in an auction for a construction permit for a new FM station on Channel 243A in Biltmore Forest, North Carolina. It refers their applications to the Mass Media Bureau for processing in accordance with the Commission's competitive bidding procedures for mutually exclusive commercial broadcast applications and stays the hearing proceeding in Docket No. 88-577 pending the outcome of the auction.

2. The Commission disqualified two applicants on site issues, Liberty Productions (Liberty) and Biltmore Forest Broadcasting FM, Inc. (BFBFM) and granted Orion's application based upon its superior integration proposal.<sup>1</sup> The Commission also denied two motions to reopen the record and enlarge the issues filed by Willsyr seeking the addition of financial, lack of candor, misrepresentation, and reporting issues against Orion. Timely notices of appeal were filed in the D.C. Circuit by the four unsuccessful applicants, Liberty, Willsyr Communications (Willsyr), BFBFM, and Skyland Broadcasting Company (Skyland). While this case was pending before the D.C. Circuit, the court issued its decision in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), holding that continued reliance on the integration criterion is arbitrary and capricious and therefore unlawful. On February 25, 1994 the Commission stayed the adjudication of all comparative broadcast cases pending resolution of the questions raised by *Bechtel*.<sup>2</sup> On March 15, 1994 the court remanded this proceeding to the Commission for further consideration in light of *Bechtel*. Pursuant to the court's explicit instructions, Orion, whose interim operation was previously rescinded by the Commission, has been reinstated as the interim operator on Channel 243A.<sup>3</sup>

3. In the Balanced Budget Act of 1997 Congress adopted Section 309(l) expressly providing that the Commission "shall have the authority to conduct a competitive bidding proceeding pursuant to subsection [309](j)" in comparative broadcast cases involving competing applications filed before July 1, 1997, and that if the Commission does conduct a competitive bidding proceeding, it "shall treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding."

4. In implementing Section 309(l) in the *First Report and Order*, the Commission found that the public interest would be best served by using auctions instead of comparative hearings to resolve the frozen comparative cases that are not otherwise settled, and devised special auction procedures for frozen hearing applicants.<sup>4</sup> Specifically, the Commission directed the General Counsel to issue an order under delegated authority in hearing cases pending before the Commission that would identify the eligible, qualified bidders entitled to participate in the auction. The Commission stated that the General Counsel should refer all such cases to the Mass Media Bureau for processing in accordance with the Commission's auction procedures and either

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<sup>1</sup>*National Communications Industries*, 7 FCC Rcd 1703 (1992), *recon. denied*, *Liberty Productions, Inc.*, 7 FCC Rcd 7581 (1992), *recon. dismissed*, 8 FCC Rcd 4264 (1993).

<sup>2</sup>*FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

<sup>3</sup>*Orion Communications Ltd. v. FCC*, 131 F.3d 176 (D.C. Cir. 1997).

<sup>4</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licensees* (MM 97-234) (First Report and Order), 13 FCC Rcd 15920, 15933 ¶ 34, 15952-56 ¶¶ 88-98 (1998), reconsideration denied, FCC 99-74 ¶¶ 7-9, 14-18 (rel. Apr. 20, 1999).

terminate or stay the hearing proceeding, depending on whether there were any unresolved hearing issues (including any unresolved petitions to enlarge issues) as to the basic qualifications of any particular applicant.<sup>5</sup> The hearing proceeding would resume after the auction, the Commission indicated, only if such unresolved qualifying issue(s) involved the auction winner. The Commission also clarified that applicants whose applications had been finally dismissed or denied would not be eligible to participate in the auction but that all applicants remaining in the proceeding would be entitled to participate in the auction without regard to any unresolved hearing issues (or outstanding petitions to enlarge issues) as to their basic qualifications.<sup>6</sup>

5. There has been no settlement agreement among the above-captioned applicants, all of whom filed their applications before July 1, 1997. The permittee for a new FM station on Channel 243A in Biltmore Forest, North Carolina will therefore be selected by a system of competitive bidding, pursuant to the Commission's auction procedures for the frozen hearing applicants. All five of the above-captioned applicants are eligible, qualified bidders entitled to participate in this auction, inasmuch as none of their applications has been finally dismissed or denied. And, of the thirteen applications originally filed for Channel 243A in Biltmore Forest, only the applications filed by Orion, Liberty, BFBFM, Skyland, and Willsyr are still pending before the Commission.<sup>7</sup> As required by Section 309(l), the five pre-July 1, 1997 pending applicants are the only qualified bidders eligible to compete in the auction. The date of the auction, as well as the deadline for filing the mandatory short-form application,<sup>8</sup> will be announced by a Public Notice issued under delegated authority by the Wireless Telecommunications Bureau and the Mass Media Bureau. By that Public Notice, the Bureaus will also seek comment on a variety of auction-specific procedural issues concerning the day-to-day conduct of the auction for the construction permit for FM Channel 243A (Biltmore Forest, North Carolina).

6. Based on the record in this case, it is also appropriate to stay the hearing proceeding in Docket 88-577 pending the outcome of the auction. The hearing proceeding will resume only if Liberty, BFBFM, or Orion wins the auction. There are unresolved questions regarding the basic qualifications of these applicants. In particular, a false site certification issue was specified

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<sup>5</sup>13 FCC Rcd at 15954 ¶ 92.

<sup>6</sup>*Id.* at 15962-63 ¶ 89.

<sup>7</sup>Seven applicants prosecuted their applications through a decision by the former Review Board. *National Communications Industries*, 6 FCC Rcd 1978 (Rev. Bd. 1991), *affirming* 5 FCC Rcd 2862 (ALJ 1990). Two applicants, National Communications Industries and Harbinger Broadcasting Company, however, did not file applications for review of the Review Board's decision. The denial of their applications is therefore final.

<sup>8</sup>In order to participate in the auction, pending applicants must file short-form applications indicating their intention to compete in the auction. *First Report and Order*, 13 FCC Rcd at 15950 ¶ 82.

and adverse findings were made against Liberty.<sup>9</sup> However, neither the former Review Board nor the Commission, having disqualified Liberty on a site availability issue, considered the merits of the false certification issue. In contrast to the site availability issues, which the Commission has decided not to adjudicate against an actual auction winner, the false site certification issue remains relevant under the Commission's competitive bidding procedures.<sup>10</sup> The hearing proceeding will therefore resume to consider the false site certification issue if Liberty is the auction winner.

6. As for BFBFM, there are no unresolved petitions to reopen the record, or outstanding hearing issues relating to its basic qualifications other than the site availability issue, which is not relevant under our auction procedures for these frozen hearing cases. However, the ALJ opined regarding his denial of a site amendment for lack of due diligence, that acceptance of the amendment would have required the specification of a misrepresentation issue against BFBFM.<sup>11</sup> This matter, in contrast to the site availability issue, could be relevant if BFBFM is the auction winner. Under these circumstances, the proceeding will therefore resume to consider the question concerning BFBFM's representations as to the availability of its transmitter site.

7. There are also unresolved issues and issue requests regarding Orion's basic qualifications. The Commission's denial of Willsyr's motions to reopen the record to add financial, lack of candor, misrepresentation and reporting issues against Orion, was appealed to the D.C. Circuit. Additionally, following the court's remand of this proceeding to the Commission, Skyland, Willsyr and Liberty filed a joint petition to reopen the record and enlarge the issues seeking the addition of financial qualifications, lack of candor and reporting issues against Orion. A separate pleading filed by BFBFM also seeks the addition of an *ex parte* issue against Orion. Pursuant to the comparative freeze the Commission has taken no action on these further issue requests. If Orion wins the auction, the hearing proceeding in MM Docket No. 88-577 will therefore resume to permit Commission consideration of any outstanding hearing issues and pending petitions to enlarge issues that relate to the auction winner's basic qualifications insofar as such issues, or issue requests raise substantial and material questions of fact as to

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<sup>9</sup>The ALJ held that, even if Liberty was qualified under the site availability issue, it would still be disqualified under the false site certification issue because of misrepresentations about their transmitter site's availability. *National Communications Industries*, 5 FCC Rcd 2862, 2867 ¶ 5, 2879 ¶ 8 (A.L.J. 1990).

<sup>10</sup>*First Report and Order*, 13 FCC Rcd at 15956 ¶ 99, indicating that the Commission would continue to consider site and financial issues insofar as they involve questions of false certification. See also *Dorothy O. Schulte and Deborah Brigham, A General Partnership*, 13 FCC Rcd 3259, 3264 (1998), *affirmed sub nom. SL Communications v. FCC*, Case No. 98-1076 (D.C. Cir. Mar. 19, 1999), holding that candor concerns the Commission whether it awards broadcast licenses after comparative proceedings or through a system of competitive bidding procedures.

<sup>11</sup> 5 FCC Rcd at 2881 n.7.

matters that are pertinent under our competitive bidding procedures for frozen hearing applicants.<sup>12</sup>

8. The hearing proceeding will not resume, however, if either Skyland or Willsyr wins the auction. There are no outstanding hearing issues or unresolved petitions to enlarge issues relating to the qualifications of either applicant.<sup>13</sup>

9. Prior to the auction, settlement agreements filed pursuant to 47 U.S.C. § 311(c) and all applicable Commission rules, including 47 C.F.R. § 1.2105(b), should be filed with the Commission, but all other matters should be presented directly to the Mass Media Bureau for resolution in accordance with the procedures for mutually exclusive applications for new FM broadcast stations.

10. ACCORDINGLY, IT IS ORDERED That, pursuant to delegated authority, as provided in the *First Report and Order*, 13 FCC Rcd at 15954-55 ¶ 94, the applications filed by Liberty Productions (File No. BPH-870831MI), Willsyr Communications (File No. BPH-870831MJ), Biltmore Forest Broadcasting FM, Inc. (File No. BPH-870831MK), Skyland Broadcasting (File No. BPH-870831ML), and Orion Communications (File No. BPH-870901ME) ARE REFERRED to the Mass Media Bureau for processing in accordance with the Commission's competitive bidding procedures for mutually exclusive commercial broadcast applications; and that Liberty Productions, Willsyr Communications, Biltmore Forest Broadcasting FM, Inc., Skyland Broadcasting and Orion Communications ARE IDENTIFIED as the only qualified bidders, eligible to participate in the auction for a construction permit for a new FM station on Channel 243A in Biltmore Forest, North Carolina.

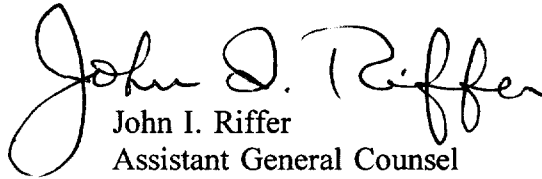
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<sup>12</sup> In the *First Report and Order*, 13 FCC Rcd at 15956 ¶ 99, the Commission indicated that, in these resumed hearing proceedings, it would, as in the case of site issues, consider unresolved financial issues (or add new financial issues if substantial and material questions of fact are raised in pending or new petitions to enlarge issues) against the winning bidder only to the extent the issues involve questions of false certification.

<sup>13</sup>See *National Communications Industries*, 5 FCC Rcd 2862, 2862 ¶ 2 (A.L.J. 1990) reflecting that at the time of the Initial Decision there were four basic qualifications issues: site availability issues against BFBFM and Liberty, a false site certification issue against Liberty and a misrepresentation issue against a third applicant who did not file exceptions to the Initial Decision and was dismissed by the former Review Board. *National Communications Industries*, 5 FCC Rcd 5670 (Rev. Bd. 1990).

11. IT IS FURTHER ORDERED That the hearing proceeding in Docket MM 88-577 IS STAYED pending the outcome of the auction and the hearing proceeding WILL RESUME to consider the basic qualifications of the auction winner only if Orion, BFBFM or Liberty wins the auction, and otherwise IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "John I. Riffer". The signature is written in a cursive style with a large, looping initial "J".

John I. Riffer  
Assistant General Counsel  
Administrative Law Division  
Office of General Counsel